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Supreme Court, U.S.
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No. 04-1099

IN THE

Supreme Court of the United States

Carol Stavropolous,

Petitioner,

v.

Evan Firestone et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Eleventh Circuit rejected petitioner's First Amendment and Title VII retaliation claims in this case because they did not arise from an "adverse employment action" under that circuit's narrow definition of that term. Pet. App. 12a, 16a-17a. As described in the petition for certiorari and discussed in more detail below, that legal rule is consistent with the law of a handful of circuits, but contrary to the law of many others, a split of authority that has been widely acknowledged by the courts of appeals themselves. See, *e.g.*, *Ray* v. *Henderson*, 217 F.3d 1234, 1241-1242 (CA9 2000) (discussing Title VII split); Pet. App. 14a n.8 (Eleventh Circuit noting split on First Amendment standard).

Respondents do not contest that the questions presented by this petition are recurring and important. See Pet. 17-19. Instead, respondents argue only that the courts of appeals are wrong in the repeated recognition of the conflicts, and that, in any event, a "strictly uniform approach to what constitutes an adverse employment action for purposes of the First Amendment and Title VII analysis is inappropriate and unnecessary." BIO 12. Respondents are wrong on both counts. While respondents decline to even distinguish the two questions presented, see *id.* at 9 & n.1, petitioner has established that there are separate, but equally deep and mature circuit splits over what constitutes actionable retaliation under the First Amendment, Pet. 6-10, and under Title VII's retaliation provision, Pet. 25-27.

The continuation of that division, and the resulting disparity in protections afforded government workers in different circuits, is unnecessary and intolerable. Whistleblowers at the Centers for Disease Control in Atlanta should enjoy the same protections from retaliation as those stationed at the Department of Health and Human Services headquarters in the District of Columbia. But that equality of protection has been lacking for many years, and will continue

until this Court resolves the widely varying standards applied in the lower courts.

I. Certiorari Should Be Granted To Resolve The Circuit Conflict Over What Acts Of Retaliation Are Actionable Under The First Amendment.

Contrary to respondents' assertion, the decision below is not consistent with a supposed uniform "flexible standard * * * applied by all judicial Circuits" to determine whether an act of retaliation is cognizable under the First Amendment. BIO 11.

As set forth in the petition, see Pet. 9-10, the majority of courts outside the Eleventh Circuit *do* apply a flexible standard, but that standard (in conflict with the Eleventh Circuit's rule) turns on whether "the actions taken by the defendants were reasonably likely to deter [the employee] from engaging in protected activity under the First Amendment." *Coszalter* v. *Salem*, 320 F.3d 968, 976 (CA9 2003) (internal punctuation omitted).[1] Under this view, "even

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[1] See also *Rivera-Jimenez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004) (relying on majority rule); *Suppan* v. *Dadonna*, 203 F.3d 228, 235 (CA3 2000) (test is whether "the alleged retaliatory conduct was sufficient 'to deter a person of ordinary firmness' from exercising his First Amendment rights"); *Goldstein* v. *Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (CA4 2000) ("[E]mployee must establish retaliation of some kind – that he was deprived of a valuable government benefit or adversely affected in a manner that, at the very least, would tend to chill his exercise of First Amendment rights."), cert. denied, 531 U.S. 1126 (2001); *Farmer* v. *Cleveland Pub. Power*, 295 F.3d 593, 602 (CA6 2002) (test is whether "the defendant's adverse action caused the plaintiff to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that [constitutionally protected] activity"); *DeGuiseppe* v. *Bellwood*, 68 F.3d 187, 191 (CA7 1995) (the "complained-of action must be sufficiently adverse to present an actual or potential danger that the speech of employees will be chilled"); *Bass* v. *Richards*, 308 F.3d 1081, 1088

minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect on speech as more drastic measures." *Smith* v. *Fruin*, 28 F.3d 646, 649 (CA7 1994), cert. denied, 513 U.S. 1083 (1995). These seven circuits thus eschew any categorical limitation on the type of conduct that may constitute actionable retaliation. See, *e.g.*, *Coszalter*, 320 F.3d at 975 ("[A] government act of retaliation * * * need not be of a certain kind."). In particular, these courts have expressly rejected the position that "only adverse employment decisions, such as termination, suspension, or transfer, in retaliation for constitutionally protected speech are illegal." *Schuler* v. *Boulder*, 189 F.3d 1304, 1309 (CA10 1999). See also, *e.g.*, *Rivera-Jimenez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004); *Tao*, 27 F.3d at 639; *Power* v. *Summers*, 226 F.3d 815, 820 (CA7 2000).

The Fifth, Eighth, and Eleventh Circuits, on the other hand, hold precisely the opposite. Those three circuits categorically limit actionable retaliation to "adverse employment actions," which they define narrowly to include only actions such as "discharges, demotions, refusal to hire or promote, and reprimands." Pet. App. 13a-14a. See also *Breaux* v. *Garland*, 205 F.3d 150, 157 (CA5) (same), cert. denied, 531 U.S. 816 (2000); *Jones* v. *Fitzgerald*, 285 F.3d 705, 713 (CA8) (same).[2]

(CA10 2002) (holding that "the government infringes upon protected activity whenever it punishes or threatens to punish protected speech," and asking whether action was "punishment that could inhibit speech and thus could infringe on [the plaintiff's] First Amendment rights"); *Tao* v. *Freeh*, 27 F.3d 635, 639 (CADC 1994) (applying majority rule).

[2] The Second Circuit has taken an intermediate view, generally agreeing with the minority's view of what constitutes an "adverse employment action," but permitting clams alleging that "the total circumstances of [the employee's] working environment changed to become unreasonably inferior and adverse when

Thus, in this case, the Eleventh Circuit specifically rejected the "likely to chill" test applied by the majority of circuits, holding that "[t]his standard is contrary to our precedents." Pet. App. 13a. The Court explained that "[w]hile it is true that a claimant must show a chilling effect on her protected speech, she must *also* show that this effect resulted from an adverse employment action," defined as an action that involves "an important condition of employment," *ibid.* (emphasis added), a category limited to "discharges, demotions, refusals to hire or promote, and reprimands," *id.* 14a. See also *Breaux*, 205 F.3d at 157 (same); *Jones*, 285 F.3d at 713 (same).

As noted in the petition, Pet. 6-7, this substantial conflict has been repeatedly acknowledged by the courts themselves. Pet. App. 14a n.8 (noting conflict with D.C. Circuit); *Pierce* v. *Texas Dep't Crim. Justice*, 37 F.3d 1146, 1150 (CA5 1994) (same), cert. denied, 514 U.S. 1107 (1995); *Rivera-Jimenez* v. *Pierluisi*, 362 F.3d 87, 94 (CA1 2004) (recognizing split between First and Fifth Circuits); *Lybrook* v. *Members of Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1340 n.2 (CA10 2000) (noting conflict); *Schuler*, 189 F.3d at 1309-10 (acknowledging, but rejecting, minority test).

The difference in legal standards is more than merely semantic; rather it consistently leads to different results for similarly situated employees in different circuits. See Pet. 13-17. Indeed, this point is aptly illustrated by the brief in opposition itself: respondents are able to defend the decision below only by relying on the narrow legal test applied by the minority circuits and rejected by the majority.

Letter Chastising Petitioner For Her Dissenting Opinion. The Eleventh Circuit held that respondents' letter chastising petitioner for publicly dissenting from a hiring decision was not actionable because it did not affect "an important

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compared to a typical or normal, not ideal or model, workplace." *Phillips* v. *Bowen*, 278 F.3d 103, 109 (2002).

condition of [her] job, such as her salary, title, position, or job duties." Pet. App. 17a. Respondents assert that a contrary holding would render "virtually any written guidance, advice or transfer of information from supervisor or employee actionable." BIO 13. Yet the majority circuits have held that such actions may, indeed, be actionable, so long as they are intended to have, and do have, a chilling effect on employee speech. See, *e.g.*, *Schuler*, 189 F.3d at 1310; *Lytle*, 382 F.3d at 987; *Belcher* v. *City of McAlester*, 324 F.3d 1203, 1207 n.4 (CA10 2003).

Internal Investigation and Files. The Eleventh Circuit likewise held that respondents' retaliatory internal investigation of petitioner was not actionable because it did not fall within the circuit's narrow list of adverse employment actions. Pet. App. 17a. The Fifth and Eighth Circuits have reached the same conclusion in other cases. See *Pierce*, 37 F.3d at 1150 (vindictive internal investigation not actionable); *Jones*, 285 F.3d at 714-715 (same); *Bechtel* v. *City of Belton*, 250 F.3d 1157, 1162 (CA8 2001) (same). In defending the Eleventh Circuit's decision, respondents argue that the investigation never led to the termination of petitioner's contract and, therefore, "the 'investigation' in itself was not related to anything even resembling an adverse action." BIO 14. But courts applying the majority rule have held that retaliatory investigations themselves may constitute actionable retaliation under the First Amendment. See *Rivera-Jimenez*, 362 F.3d at 94; *Coszalter*, 320 F.3d at 976-977; *Ulrich* v. *City & County of San Francisco*, 308 F.3d 968, 977 (CA9 2002).

False Accusations of Mental Illness. The court of appeals also held that even if false accusations of mental illness would deter petitioner from exercising her First Amendment rights, "this is not substantial enough to be actionable because it had no effect on an important condition of Stavropoulos's employment." Pet. App. 17a. Although that conclusion may be in accord with the minority view, see *Breaux*, 205 F.3d at 157-58, it conflicts with the decisions of

courts that apply the majority rule, see *DeGuiseppe*, 68 F.3d at 191; *Barrett* v. *Harrington*, 130 F.3d 246 (CA6 1997), cert. denied, 523 U.S. 1075 (1998).

Respondents attempt to show that even courts in the majority circuits would hold that a false accusation of mental illness, standing alone, is insufficient to state a First Amendment retaliation claim. See BIO 14-15. But that attempt fails. While majority courts readily acknowledge that not every false statement necessarily constitutes actionable retaliation, see, *e.g.*, *Nunez* v. *City of Los Angeles*, 147 F.3d 867, 875 (CA9 1998), none of the cases on which respondents rely holds that false accusations are a categorically insufficient foundation for a First Amendment claim. See *Awabdy* v. *City of Adelanto*, 368 F.3d 1062, 1071 (CA9 2004) (finding false accusation in addition to other acts sufficient to state a claim, but not discussing whether false accusation would be sufficient in itself); *Coszalter*, 320 F.3d at 976-977 (same). To the contrary, the decision in *Coszalter* explicitly reaffirms that "[t]o constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind." *Id.* at 975

Negative Performance Evaluation. Respondents further insist that subjecting petitioner to an unwarranted negative performance evaluation was constitutionally permissible because the evaluation was an "instance of day-to-day personnel management in an employment setting, not an 'adverse employment action.'" BIO 15. Applying the minority rule, the Eleventh Circuit agreed, concluding as a matter of law that negative performance evaluations can never be sufficient in themselves unless they lead to demotion, firing or another of the enumerated adverse employment actions. See Pet. App. 16a-17a; *Breaux*, 205 F.3d at 158-59. Courts applying the majority rule, however, have routinely held that retaliatory negative performance evaluations can be the basis of a First Amendment retaliation claim. See, *e.g.*, *Schuler*, 189 F.3d at 1310; *Ulrich*, 308 F.3d at 977; *Burgess*

v. *Independent Sch. Dist. No. I-4*, 65 Fed. Appx. 690, 694-95 (CA10 2003).

Faculty Vote Not To Renew Contract. Finally, respondents argue that the decision not to renew petitioner's teaching contract, even if done in retaliation for her speech, did not violate the First Amendment because the decision was eventually reversed after a lengthy, expensive grievance process. See BIO 16. Again, while that argument may be valid under the minority rule, see *Breaux*, 205 F.3d at 158 (rescinded reprimand not actionable), it conflicts with the legal standard in the majority of circuits, see, *e.g.*, *Tao*, 27 F.3d at 639 (forcing employee to reapply for promotion qualified as actionable retaliation, even if it did not ultimately result in denial of promotion).

II. Certiorari Should Be Granted To Resolve The Circuit Conflict Over What Acts Of Retaliation Are Actionable Under Title VII.

Respondents also fail to refute petitioner's demonstration of a deep and enduring split of authority over the proper standard for actionable retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* See Pet. 26-28. Nearly four years ago, the Solicitor General acknowledged that "[t]he courts of appeals have articulated different standards for what types of employer conduct are actionable" under Title VII's retaliation provision, 42 U.S.C. 2000e-3(a). Brief for the Respondent in Opposition, *Noland* v. *Henderson*, No. 00-1259, at 7. Indeed, the Eleventh Circuit itself long ago noted that "[t]here is a circuit split on this issue," *Wideman* v. *Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (1998), an observation repeated many times by other courts since then, see *Von Gunten* v. *Maryland*, 243 F.3d 858, 865 (CA4 2001); *Ray*, 217 F.3d at 1240; *Burger* v. *Central Apt. Mgmt.*, 168 F.3d 875, 878 (CA5 1998). The difference in legal standards is substantial, the consequences important, and the disparity in treatment among public employees in different circuits untenable.

At the heart of the conflict is a dispute over the relevance of the difference in language between Title VII's anti-discrimination and retaliation provisions. See Pet. 29. Under the retaliation provision, it is "an unlawful employment practice for an employer *to discriminate* against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this title." 42 U.S.C. 2000e-3(a) (emphasis added). The EEOC has explained that this language is "exceptionally broad" and "in contrast to the general anti-discrimination provision[] which makes it unlawful to discriminate with respect to an individual's 'terms, conditions, or privileges of employment." *U.S. Equal Opportunity Comm'n Compliance Manual* 14 (May 1998) (available at http://www.eeoc.gov/policy/docs/retal.pdf) (quoting 42 U.S.C. 2000e-2(a)(1)). The retaliation provision, on the other hand, "set[s] no qualifiers on the term 'to discriminate,' and therefore prohibit[s] *any* discrimination that is reasonably likely to deter protected activity." *Ibid.*

The First, Seventh, Ninth, Tenth and D.C. Circuits agree with the EEOC and have taken a broad view of actionable retaliation under Title VII. The Ninth Circuit has expressly adopted the EEOC's standard and holds that retaliation is actionable if it "is reasonably likely to deter" protected activity. *Ray*, 217 F.3d at 1242-43. The First Circuit also has deferred to the EEOC's interpretation. See *Noviello* v. *City of Boston*, 398 F.3d 76, 90 (2005) (noting also that "this capacious reading of [Title VII's retaliation provision] is consonant with its purpose of 'maintaining unfettered access to statutory remedial mechanisms'"). Other circuits have applied similarly broad standards, rejecting attempts to limit retaliation claims to those directly affecting the terms and conditions of employment. See *Berry* v. *Stevinson Chevrolet*, 74 F.3d 980, 986 (CA10 1996) (rejecting view that Title VII retaliation claims must be based on "formal practices linked to an existing employee/employer relationship" and permitting suit based on filing of false criminal charges); *Passer* v. *American Chem. Soc.*, 935 F.2d 322, 331 (CADC

1991) (noting that retaliation provision does not "reach only to acts of retaliation that take the form of cognizable employment actions such as discharge, transfer or demotion" and holding, instead, that all that is required is "conduct having an adverse impact on the plaintiff"); *Knox* v. *Indiana*, 93 F.3d 1327, 1334 (CA7 1996) ("The law deliberately does not take a 'laundry list' approach to retaliation.").

On the other hand, at least five circuits, including the Eleventh, have imported the "terms and conditions" qualifier from Title VII's anti-discrimination provision into the Act's retaliation provision. These courts have held categorically that retaliation that does not affect a term or condition of employment is permitted by Title VII. See *Torres* v. *Pisano*, 116 F.3d 625, 639-40 (CA2), cert. denied, 522 U.S. 997 (1997); *Robinson* v. *Pittsburgh*, 120 F.3d 1286, 1300 (CA3 1997); *Von Gunten*, 243 F.3d at 865; *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (CA8 1997); *Gupta* v. *Florida Bd. of Regents*, 212 F.3d 571, 587 (CA11 2000), cert. denied, 531 U.S. 1076 (2001). These courts are further divided with regard to what constitutes a retaliatory alteration of a term or condition of employment. The Fifth Circuit takes a particularly extreme position, recognizing only claims arising from "[u]ltimate employment decisions," defined as "acts 'such as hiring, granting leave, discharging, promoting, and compensating." *Burger*, 168 F.3d at 878. The Eighth Circuit has, at times, applied the same test, but other circuits that impose a "terms and conditions" requirement have explicitly rejected the Fifth Circuit's "ultimate employment decision" test. Compare, *e.g.*, *Manning* v. *Metro. Life Ins. Co.*, 127 F.3d 686, 692 (CA8 1997) with *Von Gunten* v. *Maryland*, 243 F.3d 858, 865 (CA4 2001) (rejecting "ultimate employment decision" test).

In this case, the Eleventh Circuit applied the more restrictive "terms and conditions" analysis to conclude that the retaliatory acts against petitioner – including the negative performance evaluation and attempt to block renewal of her contract – were not cognizable under Title VII's retaliation

provision because petitioner ultimately retained her position with the same pay and benefits. Pet. App. 11a. Courts that adhere to the broader interpretation of Title VII's retaliation provision, however, have held precisely the opposite. See, *e.g.*, *Smith* v. *Secretary of Navy*, 659 F.2d 1113, 1120 (CADC 1981) (negative performance evaluation actionable under Title VII); *Yartzoff* v. *Thomas*, 809 F.2d 1371, 1375-76 (CA9 1987) (same); *EEOC* v. *L.B. Foster Co.*, 123 F.3d 746, 754 (CA3 1997) ("An employer who retaliates cannot escape liability merely because the retaliation falls short of its intended result."), cert. denied, 522 U.S. 1147 (1998); *Hashimoto* v. *Dalton*, 118 F.3d 671, 676 (CA9 1996) (retaliatory negative job reference actionable whether or not it actually prevented employee from obtaining new job), cert. denied, 523 U.S. 1122 (1998). Certiorari should be granted to resolve this conflict.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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